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ORACLE AMERICA, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

RONG JEWETT, SOPHY WANG, XIAN MURRAY, ELIZABETH SUE PETERSEN, MARILYN CLARK, AND MANJARI KANT individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ORACLE AMERICA, INC.

Defendant.

Case No. 17CIV02669

DEFENDANT ORACLE AMERICA, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: May 31, 2019
Time: 9:00 a.m.

Assigned for all purposes to the Honorable V. Raymond Swope
Department 23

Trial Date: Not Set
Date Action Filed: June 16, 2017

PUBLIC REDACTED VERSION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' complaint centers on one substantive claim: that Oracle systematically pays women less than men for substantially similar or equal work in violation of the California Equal Pay Act (EPA). Yet Plaintiffs fail to identify a single instance in which a California court has certified a class action under the EPA, let alone one involving more than 4000 employees, at 23 different work locations (plus home offices), in 180 different positions spanning from low-level individual contributors to senior managers. This Court should not be the first.

With no grounding in precedent, Plaintiffs' motion instead rests on distortions of the facts and law. Their argument in favor of class certification depends entirely on the false premise that Oracle employees who share a job code necessarily perform "substantially equal" work, purportedly because Oracle "classifies its employees by job codes." As courts considering equal pay claims repeatedly have held, that premise fails legally because shared job titles or other labels cannot displace the EPA's requirement of fact-specific inquiries into the skill, effort, and responsibility associated with individual employees' work.

Plaintiffs' theory also fails as a factual matter. As Plaintiffs themselves admit, and extensive other evidence confirms, shared job code at Oracle *does not* equate work entailing substantially equal or similar skill, effort, and responsibility. Instead, Oracle employees with the same job code have very different duties and responsibilities, in large part because Oracle's products and services vary widely in the technologies they power and the functions they support. For this reason and others, the opinions of Plaintiffs' experts are unreliable and misleading. Indeed, both experts expressly rely on the flawed assumption that employees with the same job code perform substantially similar or equal work. Both experts admit, however, they performed no independent investigation into the work employees actually perform.

Plaintiffs also largely ignore Oracle's affirmative defenses, which further compel denying class certification. Oracle is entitled to put forth evidence of bona fide factors, such as employees' expertise, experience, work ethic, and performance, justifying pay differentials between putative class members and their purported comparators. Although Plaintiffs claim their statistical expert "controlled" for bona fide factors, this is neither true nor possible, as he all

but admitted in deposition. There is no common evidence that can resolve these individualized questions, and Plaintiffs have not proposed a trial plan that could begin to accommodate them.

Plaintiffs also seek certification on a new, alternative theory: For the first time, they allege disparate impact discrimination based on Oracle's supposed "policy and practice" of using salary history to set employees' initial compensation. The court need not even address whether to certify such a claim, however, because Plaintiffs have not pled it, and did not administratively exhaust it. Even if they had, this claim too is not susceptible to class treatment. Contrary to Plaintiffs' assertions, Oracle never had a policy or practice of basing starting pay on prior pay. Prior to October 2017 (at which point Oracle prohibited any consideration of prior pay), whether to rely on prior pay was up to individual hiring managers, who often did not consider it. Moreover, the extent to which prior pay caused any pay disparity between the putative class members and their purported comparators entails thousands of individualized assessments.

Plaintiffs also are not entitled to certification because the claims of the three "Representative Plaintiffs" are neither typical of, nor adequate to, represent the class. All three came to Oracle through one of 72 acquisitions that took place during the class period; they worked on only a few of Oracle's hundreds of products; and they never held managerial roles. Accordingly, they fail to represent the putative class, which includes thousands of employees who came to Oracle as non-acquisition hires and/or worked as managers who participated in the compensation decisions Plaintiffs attack as discriminatory. Plaintiffs' motion should be denied.

II. BACKGROUND

A. Oracle Employees Work On Diverse Suites Of Products And Services Requiring Different Skills, Duties, And Responsibilities.

Oracle is a global company that offers technology products and services for organizations of any size. Waggoner Decl. (submitted with Oracle's MSJ) ¶ 5; *see also* Miranda Decl. (submitted with Oracle's MSJ) ¶¶ 2, 9, Ex. A.[1] Oracle currently markets more than 800 active products, which cover a broad spectrum of technology needs, including cloud computing, middleware, industry-focused software, hardware, network solutions, and more. Waggoner

[1] Exhibits to declarations are referred to by the last 6 digits of the Bates number where available.

Decl. ¶¶ 5-6.

The different products, services, and technologies on which Oracle's employees work require them to master different skills, duties, and responsibilities in order to develop, enhance, modify, support, or service those products, services, and technologies. Miranda Decl. ¶¶ 3-5; Bashyam Decl. ¶¶ 7-12; Webb Decl. ¶¶ 9-11. Additionally, not all products and services have the same value to Oracle, so the value of the skills, duties, and responsibilities that correspond to one product or service may differ from those that correspond to another, and those relative values shift over time. Miranda Decl. ¶ 7.[2]

B. Oracle Organizes Itself Into Lines Of Business Structured Around Its Business Operations And The Products And Services It Delivers.

To facilitate management of its diverse business, Oracle is organized into lines of business ("LOBs") overseen by executives who focus on delivering results for Oracle's customers and shareholders specific to a distinct part of Oracle's business or operations. Waggoner Decl. ¶ 11-12; MSJ Connell Decl. Ex. P (Waggoner Dep. Vol. I) 85:1-19; 86:4-12, 87:9-88:3; MSJ Connell Decl. Ex. O (Dodson Dep.) 57:22-58:12. These broad LOBs are subdivided into organizations and teams that reflect increasingly specialized areas. Waggoner Decl. ¶ 12. Managers within LOBs fan out through a reporting hierarchy that ultimately ends with first-level managers who directly supervise individual contributors. *Id.* ¶ 13. Where a particular employee's team is located in this LOB structure may affect her compensation, as budgeting decisions for bonuses and/or salary raises are made within each LOB. *Id.* ¶¶ 14-15; *see also* Waggoner Dep. Vol. I 182:18-183:16, 186:13-188:8.

C. Oracle Broadly Describes Its Employees' Jobs By Reference To Job Function And System Job Title.

Separate and apart from Oracle's LOB system, Oracle categorizes its employees by job functions. *See* Waggoner Decl. Ex. 24 (653). Unlike LOBs, job functions do not have a "leader," and individuals who work within a given job function typically work across different

[2] For a more detailed account of the diversity of Oracle's products and services, and the skill, effort, and responsibility required of employees who work on them, *see* MSJ Mem. § II.A.

LOBs and report to "many, many, many different leaders." Waggoner Dep. Vol. I 46:21-47:23.

Job functions describe the type of work an employee does at the broadest level (*e.g.*, "Product Development"). They sweep in huge numbers of employees with vastly different skills, duties, and responsibilities, and say virtually nothing about day-to-day job duties. Waggoner Decl. ¶ 16. Within a job function, employees are further subdivided into specialty areas (*e.g.*, "development"), then job families (*e.g.*, applications developers), then, finally, system job titles, which correspond to a numeric "job code." *Id.* ¶ 19; Waggoner Dep. Vol. I Ex. 25 (4822-9). System job titles generally reflect a progression of development within a job family (*e.g.*, Applications Developer 1, Applications Developer 2, and so on). Waggoner Decl. ¶ 19; Waggoner Dep. Vol. I Ex. 25 (4822-9). Each system job title also associates a given employee with a particular career level. Waggoner Decl. ¶ 23. Career levels are broad steps that roughly reflect increased skill, knowledge, responsibility, and performance expectations. Waggoner Dep. Vol. I Ex. 25 (4822-7).

While a system job title and associated job code reflect the general type of work an employee performs and her career level, they define that work at a high level of abstraction. Waggoner Decl. ¶ 21; *see* Finberg Decl. Ex. Z; *infra* 10-12. They are not linked to any particular product or team. Waggoner Dep. Vol. I 102:5-103:9; Waggoner Decl. ¶ 21. They do not account for the tools or programming languages an employee must master, the hours her work requires, or the number and complexity of the sub-areas of a product for which she is responsible. *See* Miranda Decl. ¶¶ 3-5; Waggoner Decl. ¶ 21; Saad Decl. Ex. A (Saad Rep.) ¶¶ 73-77. In other words, the "specific duties and the things that [employees with the same job code] work[] on vary drastically across the company." Waggoner Dep. Vol. I 202:13-203:10.

D. <u>Managers Make Pay Decisions Based On Skill And Contribution.</u>

Oracle's decentralized pay process aims to achieve the overarching goals of equity within teams and recognition of each employee's particular knowledge, skills, abilities, performance, experience, and contributions. Waggoner Decl. ¶¶ 25-26, Ex. B (000334), Ex. C. (000393, 000400-01), Ex. E (slides 17, 37). An employee's direct manager typically plays the most significant role in setting that employee's compensation. *See id.* ¶ 26-27, Ex. E (16-26, 35-37,

39-40); *see* Saad Rep. ¶ 20 (putative class members reported to over 3,400 different supervisors during the class period). First-line managers, for example, determine the starting compensation to offer to new hires. Waggoner Decl. ¶ 26, Ex. E (16-26, 36); Cert. Opp. Kidder Decl. ¶ 4. Individual managers also determine salary increases. Waggoner Decl. ¶ 26. Although salary raises may occur anytime, the majority occur during "focal" reviews—company-wide review processes undertaken periodically as Oracle's business performance permits. Waggoner Decl. ¶ 26; Waggoner Dep. Vol. I 177:16-181:1, Ex. 42 (004662). During focal reviews, LOB heads receive a budget for salary increases which they allocate, in their discretion, to lower-level managers. Waggoner Dep. Vol. I 182:18-183:16, 186:13-188:8; Waggoner Decl. ¶ 27. Managers within an LOB decide how to "cascade" budget down through the organization. Waggoner Decl. ¶¶ 15, 27, 28, Ex. A (slide 6 notes). Different LOBs (and segments within each LOB) cascade budget to different levels, and whatever manager is the last recipient of allocation then either distributes compensation to individual employees or consults with lower-level managers and makes distributions based on the lower level managers' recommendations. *Id.* ¶¶ 27-28, Ex. A (6, 36, 37); *see also, e.g.*, Haskins Decl. ¶ 16; Wong Decl. ¶ 18. The bonus and equity compensation processes are similar. Waggoner Decl. ¶¶ 27-28; Waggoner Dep. Vol. I 192:4-20, 197:17-20.[3]

Managers are not required to adhere to any rigid formula or policy in making compensation decisions; they are instead instructed to consider a set of general principles. Waggoner Decl. ¶¶ 29-30, Ex. B (000334), Ex. C (000393); Waggoner Dep. Vol. I Ex. 42 (004662); MSJ Connell Decl. Ex. Q (Waggoner Dep. Vol. II) Ex. 51 (23). Those principles include considering how an employee's compensation compares to that of her peers, Waggoner Decl. ¶ 30, Ex. B (000334); accounting for each employee's relevant knowledge, skills, abilities, and experience, *id.*; Waggoner Dep. Vol. I 204:11-20; balancing external and internal equity considerations, Waggoner Dep. Vol. II, Ex. 42 (004662); Waggoner Decl. ¶ 30, Ex. B (000336);

[3] Although individual compensation decisions ultimately are subject to approval by more senior management as a "sanity check" and/or to ensure alignment with budget, those senior managers generally defer to and rarely change the decisions of the lower-level managers. Waggoner Decl. ¶¶ 26-28; Waggoner Dep. Vol. I 108:1-21, 122:11-125:3, 134:18-135:19; 189:4-191:10, 196:23-197:9, 197:17-20; *see also, e.g.*, Beer Decl. ¶ 17; Patel Decl. ¶ 13; Wong ¶¶ 12, 18-19.

and differentiating rewards by performance, Waggoner Dep. Vol. II, Ex. 42 (0004662). Managers may also consider the employee's importance to the company (for example, if a pay increase may factor into the company's ability to retain the employee). Waggoner Decl. Ex. C (000401), Ex. E (36); Waggoner Dep. Vol. II Ex. 51 (24). These factors are not exclusive—managers are advised to "[l]ook at the whole picture" and are counseled that, in making individualized decisions, pay "differences need to be based on fair, justifiable and non-discriminatory criteria." Waggoner Decl. Ex. B (000366-67), Ex. C (000401). These guiding principles ensure that pay decisions are made "on a case-by-case basis" rather than looking for a "one size fits all" solution. Waggoner Dep. Vol. II Ex. 51 (36); *see also* Waggoner Decl. Ex. C.

E. Salary Ranges Are A Tool To Assist Managers In Making Compensation Decisions, But Compensation Ultimately Turns On Individual Factors.

Oracle assigns a salary range to each unique system job title and associated job code. *See* Waggoner Decl. ¶¶ 19, 22. These ranges act as a tool to assist managers in setting initial compensation and awarding pay increases. Waggoner Dep. Vol. I 208:15-209:1; Waggoner Decl. Ex. E (16-17). To determine the salary range in a given fiscal year for each job code, Oracle uses a third-party market survey to determine the salary range Oracle's peer companies pay for jobs that best match the general description of each Oracle job code. Waggoner Dep. Vol. I 170:23-171:14, 176:8-177:15; Waggoner Decl. Ex. C (000382), Ex. E. (16). The resulting ranges generally span [redacted] This breadth is by design; "[b]road ranges ***allow managers to account for differences*** in experience, skills, competencies and performance of candidates and incumbents." Waggoner Dep. Vol. II Ex. 51 (17) (emphasis added); Waggoner Decl. Ex. C (000380-381, 395). The ranges are broader for higher-level job titles than for entry-level positions to reflect that duties, skills, abilities, and performance vary more greatly in more advanced positions. *See* Waggoner Dep. Vol. I 246:23-249:16.

F. Oracle Never Had A Policy Requiring The Consideration Of Prior Pay In Making Salary Determinations.

Managers who set initial salaries engage in an individualized, holistic process. Contrary to Plaintiffs' unsupported assertions, at no time did Oracle have a policy directing the use of

prior salary to set starting pay. *See* Waggoner Dep. Vol. I 79:23-80:13. In contending otherwise, Plaintiffs seize on an internal hiring form used prior to October 2017 that displayed the word "mandatory" next to a field for prior pay. Cert. Mem. 15. Regardless of whether this field can be construed as an instruction to managers to list prior pay on the form, Oracle never required managers to *rely* on it in setting initial compensation. Cert. Opp. Kidder Decl. ¶ 6; Waggoner Dep. Vol. II. 340:24-342:1; Wong Decl. ¶ 13.[4] Indeed, many managers often did not consider it at all, and in some instances managers did not even list it, despite the "mandatory" field. *See, e.g.*, Ahmed Decl. ¶ 12; Patel Decl. ¶ 13; Wong Decl. ¶ 13; *see also* Saad Rep. ¶ 95. And, to the extent prior salary ever played a role in setting initial compensation, it was weighed against other relevant factors, such as experience and education. Waggoner Dep. Vol. II. 345:25-346:11, 355:16-18, 356:9-357:7; Ahmed Decl. ¶ 12.

In October 2017, anticipating forthcoming changes in state law, Oracle instituted a policy banning the collection or consideration of prior salary information. Cert. Opp. Kidder Decl. ¶ 7.

G. The Role Of Pre-Acquisition Pay Depends On The Circumstances.

With respect to acquisition hires, in most cases (although not all) Oracle does not change pay at the time of acquisition, but instead makes appropriate changes to the jobs and/or pay of acquisition hires once they have settled into Oracle's structure. Waggoner Dep. Vol. I 166:25-168:12; Leftwich Decl. ¶ 7-9. Relevant factors informing pay changes include the acquired employee's skills, duties, and contributions. *Id.*; *cf.* Waggoner Dep. Vol. II. 356:24-357:7.

H. Oracle Is Committed To Equality And Fairness In Setting Pay.

Pay decisions are governed by Oracle's robust Equal Employment Opportunity policies and Code of Ethics. Oracle managers are required to make all employment decisions, including those regarding pay, "without regard to … sex," Dodson Decl. Ex. A (000420), and are

[4] Plaintiffs point to the declaration of a single manager at Oracle who states that she personally used prior pay as the "primary factor" in setting starting pay, and that she "instructed the managers reporting to [her]" to "use prior pay when setting initial pay." Cert. Mem. 15 (citing Subramanian Decl. ¶¶ 2-3). But Subramanian admits she does not know what other managers' practices were with respect to prior pay, Cert. Opp. Connell Decl. Ex. A (Subramanian Dep.) 90:19-24, does not recall the source of Oracle's purported policy of tying salary to prior pay, *id.* 84:12-85:8, and had no individuals or managers reporting to her during the class period, *id.* 74:5-16.

specifically trained on making compensation decisions without regard to gender, Waggoner Decl. ¶¶ 28, 30.

III. LEGAL STANDARD

To obtain class certification under Cal. Civ. Proc. Code § 382, Plaintiffs must "demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012). "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 326 (2004). Further, "[i]n certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 28-29 (2014). The burden of proof is on the party seeking certification. *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 922 (2001).

IV. ARGUMENT

A. Plaintiffs' EPA Claims Cannot Be Resolved On A Classwide Basis Because Individual Questions Predominate.

To determine whether individual or common questions predominate, the "ultimate question … is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Brinker*, 43 Cal. 4th at 1021 (internal quotation marks omitted). "The answer hinges on whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Id.* (internal quotation marks omitted). That inquiry "will often depend upon resolution of issues closely tied to the merits," including "whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." *Id.* at

1024. Because Plaintiffs' EPA claims depend on thousands of individualized inquiries, class treatment is unwarranted.

1. Plaintiffs Cannot Sustain Their Prima Facie Case Through Common Evidence.

a. Plaintiffs' allegations about a "job classification system" do not supply common proof.

Plaintiffs' certification arguments under the EPA hinge entirely on the notion that Oracle's so-called "job classification system" constitutes common evidence that "employees in the same job code perform the same work." Cert. Mem. 20-21. That premise fails as a matter of law. As explained in Oracle's summary judgment brief, *see* MSJ Mem. § III.B.2, the EPA looks to "actual job content," not "job titles, classifications, or divisions" to determine whether work is substantially similar or equal, as measured by the "skill, effort, and responsibility" the work requires. *Kassman v. KPMG LLP*, No. 11 CIV. 3743 (LGS), 2018 WL 6264835, at *27 (S.D.N.Y. Nov. 30, 2018) (internal quotation marks omitted); *see also Hall v. Cty. of Los Angeles*, 148 Cal. App. 4th 318, 323 n.4 (2007) ("California's courts rely on federal authorities construing the federal statute."). Comparing actual job duties requires examining "all the facts and circumstances of a particular case." *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002) (internal quotation marks omitted). That inquiry "necessarily" must be made "on a case-by-case basis." *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988).

Contrary to these controlling principles, Plaintiffs maintain that "individualized testimony about each employee's day-to-day work" is unnecessary because, in their view, job codes fully describe an employee's skill, effort, and responsibility. Cert. Mem. 20. Plaintiffs and their I/O expert apparently draw this conclusion from the "uniform descriptions of the relevant job duties and requirements" associated with each job code and the fact that Oracle establishes a salary range for each job code by mapping it to a benchmark job. Cert. Mem. 12-14, 20; Hough Decl. Ex. A (Hough Rep.) ¶¶ 10, 18. But a three- or four-sentence job description does not convey the day-to-day effort, skills, knowledge, and degree of responsibility those jobs entail. *See* MSJ Mem. § III.B.2; *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) ("sharing a job title and a job description is not dispositive" of equal work). Establishing a

salary range tied to job codes "supports only the inference that [other] factors…—[such as] job content or any number of other criteria—inform[] the determination of salaries within the curve." *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 258 (2nd Cir. 2014). Plaintiffs cite no authority for their argument that an employer's use of job codes, salary ranges, or broad descriptions eliminates the need for individualized inquiries into actual job duties, and they ignore the scores of decisions holding precisely the opposite. *See, e.g., id.* at 255-58; *Stern v. State Univ. of N.Y.*, No. 16-CV-558, 2018 WL 4863588, at * 9 (E.D.N.Y. Sept. 30, 2018); MSJ Mem. § III.B.2.

Indeed, Plaintiffs' theory leads to the absurd result that employers could use clever labeling to shield themselves from pay equity litigation: They could underpay women by assigning them different job codes from males who perform work involving the same or similar skill, effort, and responsibility.[5] Such a result would drastically undermine the purpose of the EPA and exemplifies why the EPA requires a "micro-level—rather than a macro-level—approach to comparing job responsibilities, skills and requirements." *Kassman*, 2018 WL 6264835, at *27.[6]

Even if another employer's job classification system might be granular enough that job title or code could serve as a proxy control for substantially similar or equal work, Oracle's job taxonomy entails far too much variation to qualify for any such exception. *See* MSJ Mem. § II.C. At Oracle, job codes and their descriptions represent only a "very, very high-level, general overview" of the job duties that may be associated with the position. Cert. Mem. 12-13

[5] Indeed, Plaintiffs' counsel has made the opposite argument in the wage-and-hour context, *see, e.g.*, Opening Br., *In re: Farmers Ins. Exch., Claims Representatives' Overtime Pay Lit.*, 2006 WL 2451578 at *44 (9th. Cir. Jan. 31, 2016), and wage-and-hour cases make clear that job title is not determinative of job content, *see, e.g.*, *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 585 (6th Cir. 2004); *Robinson-Smith v. Gov't Emps. Ins. Co.*, 323 F. Supp. 2d 12, 19 (D.D.C. 2004), *rev'd on other grounds*, 590 F.3d 886 (D.C. Cir. 2010).

[6] Plaintiffs argue that shared job code satisfies not only the current "substantially similar work" standard, but also the prior "equal work" standard. But "equal work" is a "demanding" standard. *Port Auth.*, 768 F.3d at 255. Indeed, the California legislature replaced "equal" with "substantially similar" to provide that "minor variations in work assignments" were acceptable, *i.e.*, that a plaintiff needn't prove she and a comparator had "identical" jobs. Cert. Opp. Request for Judicial Notice Ex. A, *Conditions of Employment: Gender Wage Differential, Hearing on S.B. 358 Before the A. Comm. on the Judiciary* at 4, 2015-2016 Reg. Sess. (July 7, 2015).

(quoting Finberg Decl. Ex. B (Waggoner Dep. Vol. I) 221:1-8; 223:20-224:17); *see also, e.g.*, Finberg Decl. Ex. Z (0000110-4) (description of IT Supervisor). Employees' day-to-day job duties, however, vary significantly based on the different products, technologies, and customers they work with. Waggoner Decl. ¶¶ 21, 24; *see* MSJ Mem. § II.A; Miranda Decl. ¶¶ 3-5; Bashyam Decl. ¶¶ 7-12; Webb Decl. ¶¶ 9-11. For example, a Software Developer 4 with job code 10540 working in the Sustaining Engineering product group must be skilled in different languages, database technologies, scripts, and other development tools than a Software Developer 4 with the same job code working in the Oracle Data Cloud product group.[7] MSJ Kidder Decl. ¶ 5; *see* Mantoan Decl. ISO Motion to Strike Hough Ex. A (Hough Dep.) Exs. 4, 5 (describing varied duties of open positions with the same job code); Saad Rep. ¶¶ 24-30, 73-77.[8]

Remarkably, named Plaintiffs, along with multiple members of the putative class, have *admitted* that Oracle employees who share a job title perform substantially different work, thus contradicting the key premise of the class certification motion:

- Plaintiff Clark acknowledges that a database administrator teammate with the same job title, who reported to the same manager, performed a "different kind of work than what I did." MSJ Connell Decl. Ex. G (Clark Dep.) 158:7-158:16.
- Another putative class member explains that her "sole responsibility is to produce training videos related to product updates and enhancements" for Oracle CRM software, and that she is "unaware of any other Oracle employee" with her job title who performs the same "specialized … job duties." Kling Decl. ¶ 6.
- A different putative class member affirms that, whereas one Product Management VP on her team "operates as a spokesperson and has no direct reports," other Product Management VPs "work on products and lead teams with direct reports"—of those, one "focuses on student cloud delivery, product design, and innovation, which requires experience in artificial intelligence and machine learning," whereas the other "focuses on financial aid," which does not require knowledge of artificial intelligence and machine learning but does require "an in-depth understanding of relevant

[7] Plaintiffs suggest that working on different products is not a basis for differentiating work because employees generally do not change salaries when they change teams. Cert. Mem. 13. Even if true, this general practice does not absolve Plaintiffs of the need to look at actual job content to demonstrate job similarity. The vast weight of authority provides that shared job title is *not* dispositive where employees work with different products, technologies, and customers. *See, e.g.*, MSJ Request for Judicial Notice Ex. B (CAL. PAY EQUITY TASK FORCE, STEP-BY-STEP JOB EVALUATION TEMPLATE FOR EMPLOYERS TO DETERMINE WAGE RATE 2-3, 12-13 n. vii (2018)), https://tinyurl.com/yadyurks (hereinafter "CAL. PAY EQUITY TASK FORCE"); *infra* 12.

[8] For further examples of individuals with the same job code performing work that is not substantially similar, *see* MSJ Mem. § IV.C-F. *See also, e.g.*, Ahmed Decl. ¶ 7-8; Haskins Decl. ¶ 9-14; Wong Decl. ¶¶ 5-9; Sarwal Decl. ¶¶ 5-12.

financial legislation at the federal and state level." Wong Decl. ¶ 8.

- Plaintiff Petersen states that her more experienced teammate knew "a lot of things that … [she] did not know," and was "proficient in a lot of things that [she] was not." MSJ Connell Decl. Ex. L (Petersen Dep.) 85:6-16.

- Many other putative class members confirm the work they do is specialized and requires distinct skills from that performed by others that share their job title. *See, e.g.*, Adams Decl. ¶¶ 13-14; Doyel Decl. ¶¶ 9-10; Perrin Decl. ¶¶ 9-10; Porobic Decl. ¶¶ 6-7; Tahmasebi Decl. ¶ 12.[9]

The differences in work duties that exist within each job code are precisely the sorts of variations that distinguish employees for EPA purposes and therefore preclude class treatment. *See Randall v. Rolls-Royce Corp.*, 742 F. Supp. 2d 974, 985 (S.D. Ind. 2010), *aff'd*, 637 F.3d 818 (7th Cir. 2011) (female Operations Director could not make out an EPA claim by comparing herself to males who shared her title but were "responsible for different products and parts and had varying numbers of employees answering to them at different times"); *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1246 (8th Cir. 1981) (insurance employee did not perform equal work to alleged comparators who were required to, among other things, "learn the interrelationship of various departments in the company and to be able to coordinate activities" between departments); CAL. PAY EQUITY TASK FORCE 2 (two employees, both of whom "diagnose[] problems with customer lines," do not perform substantially similar work where one works with a testing system that requires "expert training in diagnostic techniques and a high degree of specialized computer skill").

[9] Plaintiffs' contention that "Oracle should not [be] permitted to disown its own job classification system in an attempt to avoid liability," Cert. Mem. 20 n.7, misrepresents how Oracle operates. Oracle does not treat job code as dispositive of the type or value of work, as the vast salary ranges associated with each code and the above examples confirm. *See* MSJ Mem. §§ II.D-E. Indeed, managers are specifically instructed when setting pay for a particular job within one of these broad bands to consider—in addition to pay equity among existing employees—the specific skills, duties, and responsibilities involved in the particular job they are filling. *Supra* 4-6. The facts here are thus entirely distinct from the situation in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), where the employer's own evaluation found that "male night inspectors" and "female day inspectors" were "equal in all respects," including "manual skill," "versatility," "job knowledge," and "responsibility"—the jobs differed only in that women worked during the day and men worked at night. *Id.* at 190, 203 n.22, 207.

b. Plaintiffs' allegations about "company-wide policies" do not provide common proof.

Plaintiffs cannot cure this gaping hole in their certification theory by pointing to "written policies and guidelines for making compensation decisions," which, in their view, lead to "hierarchical and centralized" decisions. Cert. Mem. 10-11. As explained above (at 4-6), individual pay decisions are made by a vast group of individual managers; during the class period, putative class members reported to over 3,400 supervisors. Saad Rep. ¶ 20. That managers consider a variety of non-discriminatory factors does not give rise to a uniform mode of decision-making where, as here, the criteria are individualized—performance, for example, reflects work on teams with different priorities—and managers assign factors different weights, *e.g.*, Ahmed Decl. ¶ 17; Haskins Decl. ¶ 16; Patel Decl. ¶ 14; Wong Decl. ¶ 14. *See Moussouris v. Microsoft Corp.*, No. C15-1483JLR, 2018 WL 3328418, at *17, 20 (W.D. Wash. June 25, 2018). Similarly, the fact that managers usually set salaries within a range does not diminish the individualized nature of the pay decisions. *Supra* 6. Oracle's salary ranges generally span [redacted] to "allow managers to account for differences in experience, skills, competencies and performance." Waggoner Dep. Vol. II Ex. 51 (17); *see* MSJ Mem. § II.D-E. And the mere fact that pay decisions are subject to approval by senior executives does not "establish top management as a common denominator" where, as here, "evidence establishes that the recommendations of lower level . . . managers [are] almost always accepted." *Moussouris*, 2018 WL 3328418, at *18 (quoting *Jones v. Nat'l Council of YMCA*, 34 F. Supp. 3d 896, 908 (N.D. Ill. 2014)); *supra* 5 n.3.

Even if Plaintiffs' depiction of Oracle's policies were credited, *but see supra* 4-6, *infra* 22 n.19, those policies do not create a common issue as to their prima facie case under the EPA. Evidence of uniform policies may be relevant to *intent-based* causes of action, *e.g.*, disparate treatment, where "the ultimate question is whether the employer followed a policy or practice of unlawful discrimination." *Duran*, 59 Cal. 4th at 36. But in an EPA case, as in a misclassification case, liability depends on "individual circumstances, *not* the employer's intent." *Id.* As the Court of Appeal recently reaffirmed in upholding denial of certification in a

misclassification case, "the mere fact that [a company] has common policies applicable to all employees … cannot, alone, compel class certification" where the question what each putative class member "*actually* does and how much independence … [she] *actually* exercises" requires individualized proof. *Mies v. Sephora U.S.A., Inc.*, 234 Cal. App. 4th 967, 983-84 (2015).

c. Plaintiffs' statistical report does not provide common proof.

Plaintiffs attempt to paper over lack of common evidence with an expert's statistical report.[10] But Plaintiffs' statistical report is premised on the same (faulty) assumption that employees with the same job code and salary range perform "substantially equal" work. Neumark Decl. Ex. A (Neumark Rep.) ¶ 8(b); *see* Mantoan Decl. ISO Motion to Strike Neumark Ex. A (Neumark Dep.) 81:4-16, 105:8-106:3, 178:20-179:19, 183:10-184:1.[11] Although Neumark purports to "control for differences in jobs" by adding dummy variables for "part-time status, hourly status, and work location (zip code)," as well as "Line of Business," Neumark Rep. ¶ 27, these controls do not track the EPA standard, which requires an examination of an employee's skill (*e.g.*, coding languages, operating systems used, complexity of issues handled), effort (*e.g.*, hours worked and mental exertion required), and responsibility (*e.g.*, employees managed and size of team budget). None of Neumark's controls captures those criteria. *See* Saad Rep. ¶¶ 24-30, 47-48, 146. "Lines of business," for example, encompass many specialized teams working on discrete products that require different knowledge and skill. *See* Waggoner Decl. ¶¶ 11-12; Miranda Decl. ¶ 4. And employees in the same location frequently work on different products and have different roles. *See, e.g.*, MSJ Mem. § IV.C. (comparing Plaintiff Jewett with Yao). Courts routinely dismiss statistical analyses that fail to isolate proper comparators. *See, e.g.*, *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 263 (4th

[10] It is appropriate for this Court to resolve at the class certification stage whether Neumark's statistical evidence can identify comparators. "[W]hether an element may be established collectively or only individually, plaintiff by plaintiff, can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits." *Brinker*, 53 Cal. 4th at 1024. A court is thus entitled to "discredit" one party's evidence at the certification stage. *Duran*, 59 Cal. 4th at 32.

[11] Neumark's analysis "treat[s] persons in the same job code and grade as performing substantially equal or similar work." Neumark Rep. ¶ 8(b). Job grades correspond to salary ranges. Saad Rep. ¶ 5 n.3; Waggoner Decl. Ex. C at 000387. Each job code is associated with only one job grade, although the job grade and range for a job code can change year to year based on market data. Saad Rep. ¶ 5 n.3.

Cir. 2005) (affirming exclusion of statistical analysis lumping employees together into overbroad job groupings, finding "too much disparity in the groups" and no "factor that would control for the actual … job duties"); *Cooper v. S. Co.*, 260 F. Supp. 2d 1305, 1314, 1317 (N.D. Ga. 2003), *aff'd*, 390 F.3d 695 (11th Cir. 2004).

Moreover, as Oracle's expert explains, the wide variability in pay among Oracle employees who share the same job code—including both males and females—supports the notion that those employees perform substantially different work. Saad Rep. ¶¶ 49-61. Additionally, because of that variability, plaintiffs' statistical model fails to demonstrate "any *consistent* pattern" and does not constitute "common" evidence supporting certification. *See Abram v. United Parcel Serv. of Am., Inc.* 200 F.R.D. 424, 431 (E.D. Wis. 2001); Saad Rep. ¶¶ 37-43. That is especially true in the equal pay context, where each putative class member "may not compare herself to a hypothetical male with a composite average of a group's skill, effort, and responsibility, but must identify a particular male for the inquiry"; every class member's claim would thus require a minitrial. *Houck v. Va. Polytechnic Inst.*, 10 F.3d 204, 206 (4th Cir. 1993); *accord Kassman*, 2018 WL 6264835 at *27 ("[I]f the Proposed Collective were certified, it would be necessary to: (1) match the Opt-ins with 1,100 unique proposed male comparators; (2) adjudicate approximately 1,100 'equal work' questions and only then (3) turn to any individualized defenses … with respect to specific Opt-Ins (e.g., poor performance reviews)."); *see also infra* 24-25.[12] For this reason as well, certification is not appropriate here.

2. Oracle's Defenses Cannot Be Resolved Through Common Evidence.

Even if Plaintiffs could identify comparators through common proof, Oracle would be entitled to an affirmative defense that any class member's pay differential is based on "[a] bona fide factor other than sex, such as education, training, or experience." Cal. Lab. Code

[12] Plaintiffs also repeatedly trumpet Neumark's conclusion of a "gender pay gap" at Oracle. Cert. Mem. 9, 22, 27. But "an EPA plaintiff [cannot] make out a prima facie case of discrimination by virtue of generic evidence of pay disparities between males and females in a given company." *Chiaramonte v. Animal Med. Ctr.*, 677 F. App'x 689, 692 (2d Cir. 2017). Indeed, the EPA does not prohibit "pay *gaps*"—*i.e.*, a difference between men's and women's pay across wide swaths of a company—but rather requires that men and women are paid the same *for substantially similar or equal work.* Similarly, Neumark's analysis based on "total compensation" is so fraught with error it must be rejected. Saad Rep. ¶¶ 119-126.

§ 1197.5(a)(1)(D); *see also* § 1197.5(a)(2)-(3). These defenses require engaging in precisely the type of individualized inquiries that render class adjudication inappropriate.

A defendant has a right to assert individualized affirmative defenses to every class member's claim. *See, e.g.*, *Duran*, 59 Cal. 4th at 13 (class action is improper if it prevents defendant from showing some class members were not wronged and "entitled to no recovery"). Thus, even if Plaintiffs could establish a prima facie case that Oracle paid each of over 4,000 purported class members less than men who performed substantially similar or equal work, Oracle would be entitled to defend every such wage differential with bona fide factors. Proof of affirmative defenses will vary for each class member and will require looking at any number of considerations. The defense may require looking at individualized performance, *see* MSJ Mem. § IV.D.2.b (Plaintiff Kant did not exceed expectations in performance, whereas her comparator did); comparing education, training, or number of years working in a particular role, *see* Porobic Decl. ¶ 5 (PhD studies and related experiences are directly relevant to her duties at Oracle); or some other combination of factors, *see, e.g.*, CAL. PAY EQUITY TASK FORCE 5 ("one or more … [bona fide] factors can be a valid basis for a wage difference").

Plaintiffs claim there is no need for individualized proof because Neumark's analysis "control[s]" for bona fide factors, and none explains the pay differential observed. Cert. Mem. 14, 22-23. Not true. Even assuming Neumark's analysis could control for all bona fide factors, his analysis still would show only a pay inequity between men and women occupying that job code when considered in the aggregate. It would not answer whether there is a bona fide reason for any pay disparity with respect to a *particular* class member's pay. *See Moussouris*, 2018 WL 3328418 at *24. Indeed, Neumark himself *admits* his model cannot predict whether a male was paid more than a given female for bona fide reasons. Neumark Dep. 247:21-248:13. Indeed, even assuming that all employees who share a job code perform substantially similar work, the great variability in pay, including the fact that many women were paid more than men with the same job code, is a strong indication that factors other than gender explain individual pay disparities among class members and their comparators. Saad Rep. ¶¶ 49-61.

Moreover, the factors for which Neumark purports to control—tenure, performance,

experience, and location—are not the only factors companies may consider, and data points in a database cannot possibly capture the nuances and qualitative aspects of these factors in any individual case. *See* MSJ § III.B.1. Indeed, Neumark "controls" for experience by looking at age—a crude proxy that ignores entirely the *relevance* of prior experience. Mem. ISO Mot. to Strike Neumark 10-11. He also ignores key factors such as expertise, skills, and training. *See Mazzella v. RCA Glob. Commc'ns, Inc.*, 642 F. Supp. 1531, 1551-52 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987) (expertise and experience are bona fide factors); *Mullenix v. Forsyth Dental Infirmary for Children*, 965 F. Supp. 120, 139-140 (D. Mass. 1996) ("skills which the employer deems useful to the position" is a bona fide factor); CAL. PAY EQUITY TASK FORCE 8 (training is a bona fide factor). And although Neumark purports to control for performance via numerical ratings, he fails to account for the more qualitative aspects of performance, *see, e.g.*, Dorsey Decl. ¶ 18, and he admits the performance rating data is incomplete, Neumark Rep. ¶ 37.

Plaintiffs also claim that the Court need not look at bona fide factors at all because every class member's salary was based "at least in part" on prior pay. Cert. Mem. 15-16, 22-23. Plaintiffs contend that the EPA has always prohibited such practice. *Id.* at 22. Thus, they maintain that Oracle's affirmative defenses will categorically fail because no *legitimate* factor can account for the wage differential between a class member and her comparators. *Id.* at 22-23.[13] Plaintiffs are wrong both legally and factually.

First, the EPA has *not* always prohibited any reliance on prior pay to justify wages. Only as of January 1, 2019, did the EPA provide that prior pay cannot justify "*any* disparity in compensation," Cal. Lab. Code § 1197.5(a)(4)) (emphasis added).[14] For the vast majority of the

[13] Although Plaintiffs' motion fixates on Oracle's supposed policy of using prior salary to set pay, Plaintiffs say next to nothing about that alleged practice in their complaint. The closest the complaint comes is in passing references to the fact that the three Plaintiffs who came to Oracle through the PeopleSoft acquisition moved over at their existing salary, *see* Fourth Am. Compl. ¶¶ 10-12, but the complaint attributes no legal significance to that allegation. *See also infra* 21.

[14] The EPA was amended twice during the class period regarding use of prior pay, so there are three different standards that apply here. Up until January 1, 2017, the EPA did not impose any explicit limitation on reliance on prior pay to explain pay disparities. Cal. Lab. Code 1197.5 (1985). Beginning January 1, 2017, the statute provided that "prior salary shall not, *by itself*, justify any disparity in compensation." Stats.2016, c.856 (A.B.1676), § 2 (emphasis added). As of January 1, 2019, the EPA provides that "prior salary shall not justify *any* disparity in compensation." *See* Stats.2018, c.127 (A.B.2282), § 2 (codified as amended at Cal. Lab. Code § 1197.5(a)(4)) (emphasis added).

class period, the law allowed at least some reliance on prior pay as an individualized affirmative defense to explain disparities, as the EPA *explicitly* recognized between January 1, 2017, and December 31, 2018. *See, e.g.*, *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Green v. Par Pools, Inc.*, 111 Cal. App. 4th 620, 629 (2003) (approving of *Irby*); CAL. PAY EQUITY TASK FORCE 14 n.xv (citing *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982)).

Second, as explained, *supra* 6-7, Oracle had no "policy" of setting new hires' pay based on prior salary. Accordingly, in order to determine whether a manager relied on prior pay in any individual circumstance, and (more importantly) whether it explains—even in part—any wage differential between a class member and comparator, the Court would need to go class member by class member. Plaintiffs cannot simply *assume* prior pay plays a role in explaining any wage difference during the class period. With respect to acquisitions, even if Oracle did bring on many acquired employees without changing their pre-acquisition pay, this was not always the case and post-acquisition adjustments were made in the regular course. *Supra* 7. Moreover, Plaintiffs have not established that either California's salary history ban or the post-January 1, 2019, prohibition on relying upon "prior pay" to justify disparities among current employees applies to the pre-acquisition pay of acquired employees. No California court has addressed that question and, indeed, New York City has issued reasoned guidance explaining that "employees of [an acquired] company are not 'job applicants' for the purposes of [its] salary history law."[15]

Even where prior pay did play a role (or pre-acquisition pay initially did stay the same), subsequent salary increases, bonuses, and equity grants may have attenuated the link between current salary and prior pay by the start of the class period.[16] Plaintiffs have not demonstrated any consistent practice producing a "uniform, illegal effect" that obviates individualized assessments into the reasons a particular class member was paid less than a male comparator. *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 992 (2013); *see also Brinker*, 3 Cal. 4th

[15] Cert. Opp. Request for Judicial Notice Ex. B., *NYC Salary History Law: FAQs*, https://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page.

[16] For example, shortly after joining Oracle through the PeopleSoft acquisition in 2005, Clark promptly received two raises and changed positions within the company. Waggoner Decl. ¶¶ 55-56. These, and numerous other intervening factors—including not only pay changes impacting Clark, but also her comparators—render the relationship between her current salary and her initial salary, set well over a decade ago, attenuated at best.

at 1024 ("[W]hether an element may be established collectively or only individually, plaintiff by plaintiff, can … require resolution of disputed legal or factual issues affecting the merits.").

3. Oracle's California Offices Are Not The Same Establishment.

Even setting aside the individualized issues described above, there is yet another reason plaintiffs' EPA claims are unsuitable for class treatment: As explained in Oracle's summary judgment brief, MSJ Mem. § IV.G, all class members with claims based on work performed prior to January 1, 2016, must prove that they and their comparators performed work in the same "establishment." Cal. Lab. Code § 1197.5(a) (1985). Contrary to Plaintiffs' assertion, Oracle's 23 offices throughout California (Saad Rep. ¶ 5) are not a single "establishment." Even if it were true that Oracle "has a single set of compensation policies and guidelines in California," Cert. Mem. 23, the EPA presumes physically separate offices are different establishments unless "a central administrative unit … set[s] wages." 29 C.F.R. § 1620.9(b). As explained, *supra* 4-6, Oracle empowers individual managers to decide where a particular employee's salary falls within broad salary ranges—ranges which differ for employees who work at Oracle's Redwood City headquarters as opposed to other California locations, Waggoner Decl. ¶ 22. When "salary decisions are really made locally," courts have declined to look more broadly to define the relevant establishment, "even when a company creates national salary ranges and requires approval of the local decision maker's salary recommendation." *Collins v. Dollar Tree Stores, Inc.*, 788 F. Supp. 2d 1328, 1342 (N.D. Ala. 2011) (applying *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586 (11th Cir. 1994), which Plaintiffs cite for its definition of "establishment," Cert. Mem. 23). There is thus no basis for a statewide class for pre-2016 claims.

4. Oracle's Alleged Willfulness Is Irrelevant To Class Certification And, In Any Event, Cannot Be Established With Common Evidence.

Plaintiffs admit their discussion of willfulness is a red herring. *See* Cert. Mem. 25 ("Plaintiffs need not prove that Oracle acted willfully at this class certification stage …."). The only effect of a willfulness finding would be to extend the EPA's limitations period from two to three years, but Plaintiffs are also bringing a UCL claim predicated on the EPA, and UCL claims are subject to a *four*-year limitations period. *Id.* at 26 n.14. Thus, whether Oracle's supposed

willfulness can be established through common evidence is of no consequence to this motion.

Plaintiffs nonetheless use willfulness as an excuse to dredge up a series of irrelevant and prejudicial contentions, including OFCCP's unadjudicated allegations, an industrial organization psychologist's conclusory "findings," and Plaintiffs' baseless charges that Oracle's managers "abdicated their responsibility for ensuring pay equity." Cert. Mem. 24. This supposed proof of willfulness rests entirely on unproven allegations that do nothing to show that Oracle violated the EPA in the first place, let alone did so willfully.

Plaintiffs' citations to OFCCP's investigation only confirms this is a lawyer-driven follow-on to the government's action. *See* MSJ Mem. 17. OFCCP's charges are in active litigation and provide no reason to certify a class. Similarly misleading are Plaintiffs' references to Oracle's "knowledge of [a] gender pay gap." Cert. Mem. 25. The fact that management had access to pay data is not the same thing as knowing of purported EPA violations.[17]

For reasons already explained, Oracle's alleged use of prior salary to set compensation does not provide common proof of any EPA violation, far less a willful one. Even setting aside the fact that the EPA permitted use of prior pay to set salaries, and further allowed prior pay to justify wage differences, during the majority of the class period, managers were not required to—and often did not—rely on prior pay at all in setting compensation. *Supra* 7. Plaintiffs' claim that Oracle somehow "*institutionalized*" pay inequity during the class period, Cert. Mem. 25, contradicts both governing law and the undisputed factual record.[18]

B. Even If Plaintiffs Had Pleaded A Disparate Impact Claim Under The UCL And FEHA, That Claim Cannot Be Resolved On A Classwide Basis.

Perhaps realizing their EPA claim is not certifiable, Plaintiffs for the first time suggest (Cert. Mem. 26-28) their unfair competition law (UCL) claim encompasses a claim of disparate

[17] Dr. Hough's conclusion that Oracle's compensation policies are inadequate depends entirely on the OFCCP's unadjudicated findings, media reports she cannot identify, and Dr. Neumark's statistical analysis. *See* Hough Rep. ¶¶ 28-33. She offers no independent analysis to support her premise that Oracle systematically paid women less than men for the same or substantially similar work. Mem. ISO Mot. to Strike Hough 5-8; *see also* Hough Dep. 104:17-105:15.

[18] Plaintiffs mischaracterize an Oracle document as an admission that prior salary "may contribute to the gender wage gap by perpetuating wage inequities." Cert. Mem. 25. In context, the document makes clear this quoted language describes the purported justification for the new legislation, rather than Oracle's own views of pay equity. Finberg Decl. Ex. FF 1.

impact discrimination under the Fair Employment and Housing Act (FEHA). This newly asserted claim, however, does not warrant granting Plaintiffs' motion for several reasons.

First, Plaintiffs' complaint alleged one and only one unfair business practice under the UCL: that of "paying women less than men for equal and substantially similar work." Fourth Am. Compl. ¶ 39. It says nothing about a disparate impact FEHA claim—indeed, Plaintiffs' only reference to FEHA is to say that Oracle's alleged violation of the EPA also violates the public policy embodied in FEHA. *Id.* Plaintiffs cannot seek to certify a class based on legal theories never disclosed in their complaint. *See, e.g.*, *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prod. Liab. Litig.*, 288 F.R.D. 445, 448 n.4 (C.D. Cal. 2013) ("A motion for class certification is not the appropriate mechanism to introduce new claims."), *aff'd sub nom. Kramer v. Toyota Motor Corp.*, 668 F. App'x 765 (9th Cir. 2016). To hold otherwise would permit plaintiffs to circumvent timely disclosure of causes of action, subsequently tested through demurrer and summary judgment. *See Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 440 (2000); *cf. Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1254 (2009) ("Declarations in opposition to a motion for summary judgment are no substitute for amended pleadings.") (internal quotation marks omitted); *Ste. Marie v. E. R. Ass'n*, 650 F.2d 395, 399 n.2 (2d Cir. 1981) ("We reject this belated attempt to introduce a new [disparate impact] theory of liability" because it would be "manifestly unfair" to defendants.).

Second, Plaintiffs' disparate-impact theory fails because Plaintiffs did not administratively exhaust any FEHA claim by first filing a complaint with the Department of Fair Employment and Housing and obtaining a "right to sue" letter. *Okoli v. Lockheed Tech. Operations Co.*, 36 Cal. App. 4th 1607, 1613 (1995). This conclusion equally applies here, where Plaintiffs purport to base their UCL claim on an alleged FEHA violation. *Asencio v. Miller Brewing Co.*, 283 F. App'x 559, 561-62 (9th Cir. 2008); *Vasconcellos v. Sara Lee Bakery*, No. C 13-2685 SI, 2013 WL 6139781, at *4 (N.D. Cal. Nov. 21, 2013) (dismissing FEHA claim and derivative UCL claim where plaintiff failed to exhaust) *(citing In re Vaccine Cases*, 134 Cal. App. 4th 438, 458-59 (2005)); *Sarkizi v. Graham Packaging Co.*, No. 1:13-CV-1435 AWI SKO,

2014 WL 6090417, at *8-9 (E.D. Cal. Nov. 13, 2014) (plaintiff may not plead around bar to FEHA claim by alleging derivative UCL claims).[19]

Third, even setting aside these threshold legal flaws, Plaintiffs' disparate-impact theory cannot be litigated through common proof. To obtain certification of a disparate impact claim, Plaintiffs must show there is "a common answer to the crucial question *why was I disfavored*." *Wal-Mart, Inc. v. Dukes*, 564 U.S.338, 352 (2011). Here, even if reliance on prior salary could support a FEHA violation, the answer to the "why-was-I-disfavored" question would vary by employee because many managers did not always consider prior pay information. *See supra* 7; *Dukes*, 564 U.S. at 356; *see also Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 198 (D.D.C. 2017) (requiring plaintiffs to demonstrate that "all managers would exercise their discretion in a common way" (citation and internal quotation marks omitted)); *Kassman*, 2018 WL 6265845, at *20 (no certification of disparate impact claims; several factors, including "the relative freedom and independence extended to local supervisors who made pay and promotion decisions … all dictate the conclusion that there was no common mode of exercising discretion that would warrant class certification after *Dukes*").

The Court of Appeal's decision in *Safeway*, 238 Cal. App. 4th 1138, (Cert. Mem. 26, 28),

[19] Even if Plaintiffs' disparate impact theory were properly before this Court, certification is unwarranted because Plaintiffs have failed to identify any evidence that could make out a prima facie case. *Cf. Safeway, Inc. v. Super. Ct.*, 238 Cal. App. 4th 1138, 1147 (2015) (merits determinations may be proper in ruling on a certification motion). To sustain their purported claim, Plaintiffs bear the burden of showing that Oracle had a specific policy of using prior pay to determine compensation, and that this policy had a disparate impact on women. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 n.20 (2000). Evidence of "statistical disparities," untethered to a specific policy, is not enough. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988). Here, there was never any policy requiring managers to rely on prior pay—many managers opted to make pay decisions without regard to prior pay. Cert Opp. Kidder Decl. ¶¶ 3-6; *supra* 7. Even if such a policy existed, evaluating the discriminatory effect of some reliance on prior salary "involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis." *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985); *accord, e.g., Spaulding v. Univ. of Wash.*, 740 F.2d 686, 706 (9th Cir. 1984). Moreover, Plaintiffs have failed to identify any evidence that Oracle's alleged policy actually *caused* a disparate impact. *Alch v. Super. Ct.*, 165 Cal. App. 4th 1412, 1428 (2008); Saad Rep. ¶¶ 78-92. Plaintiffs' expert's report only discloses that prior pay was *correlated* with current pay. Neumark Rep. ¶ 8(d); Saad Rep. ¶¶ 79-80. That is unsurprising, given Oracle's pay bands are informed by market trend surveys, *supra* 6, and employees are unlikely to leave their current job for less money. Waggoner Dep. Vol. II. 283:18-284:18. Indeed, Neumark *admits* the correlation he observed would likely exist even if prior pay was not considered. Neumark Dep. 295:1-297:14.

provides no support for Plaintiffs' argument. That case holds that a UCL class may proceed where, in addition to other factors, plaintiffs make an "evidentiary showing" that their theory of liability does not require "excessive individualized assessments of time punch data or similar inquiries." *Id.* at 1158-61. Plaintiffs have made no such showing here. *Supra* 9-19. *Safeway* does not, as plaintiffs suggest, stand for the sweeping proposition that a UCL class may be certified based on bare allegations of "the absence of a policy" or "failure to institute a system" to effectuate an aim of the Labor Code. Cert. Mem. 28 (emphasis omitted). *Safeway* instead cautions that certification is inappropriate where, as here, "every member of the alleged class would be required to litigate numerous and substantial questions determining [her] individual right to recover." 238 Cal. App. 4th at 1154 (internal quotation marks omitted).

C. <u>The Representative Plaintiffs' Claims Are Not Typical.</u>

Representative Plaintiffs came to Oracle as part of the same acquisition (PeopleSoft), worked out of the same office in Pleasanton, focused on a narrow subset of the wide array of products and services that Oracle develops, worked in only a few job codes in a class that spans 180 job codes from individual contributors to senior managers (Saad Rep. ¶ 5), and are no longer Oracle employees. Accordingly, their alleged injuries are atypical of class members who worked on different products and services in different locations. *See, e.g.*, *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007) ("The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (internal quotation marks omitted)); *see also Martinez v. Joe's Crab Shack Holdings*, 231 Cal. App. 4th 362, 375 (2014) ("A class representative who does not have a claim against the defendants cannot satisfy the typicality requirement."). Oracle's decentralized compensation philosophy precludes treating any one employee's experience as representative. *Cf. Moussouris*, 2018 WL 3328418, at *28 ("Given the discretion-based system [for pay and promotion], the individualized inquiry will vary for each plaintiff, foreclosing any contention that the named plaintiffs' claims are typical.").

Besides working on only a tiny subset of Oracle's diverse products and services,

Plaintiffs' claims are clearly atypical in at least one additional respect: The three of them came to Oracle through acquisitions, whereas many of the class members of the class they purport to represent were not acquisition hires and, thus, were subject to different practices regarding starting pay. In other words, Plaintiffs' challenge a "course of conduct," *Seastrom*, 149 Cal. App. 4th at 1502, that is unique to their hiring channel and does not cover all class members.

D. The Representative Plaintiffs Cannot Adequately Represent The Class.

"The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent." *JP Morgan & Co. v. Super. Ct.*, 113 Cal. App. 4th 195, 212 (2003). Here, there is an intractable conflict between non-managers like Plaintiffs and the managers they seek to represent. Plaintiffs allege that Oracle knowingly implemented a system that perpetuated pay inequities and systematically paid women less than men for substantially similar or equal work. Many class members are managers who carried out the very pay decisions Plaintiffs challenge as discriminatory. Courts routinely deny certification where the theory of liability requires finding that supervisor class members participated in the same pay decisions alleged to be unlawful.[20] Plaintiffs fail to address or even to acknowledge this conflict.

E. There Is No Manageable Way To Try This Case On A Classwide Basis.

"[T]he manageability of individual issues is just as important as the existence of common questions uniting the proposed class." *Duran*, 59 Cal. 4th at 29. Plaintiffs' trial plan does not explain how the Court can efficiently adjudicate more than 4,000 individual claims. Plaintiffs claim they will rely upon "PMQ testimony and … company documents" purportedly showing Oracle assigned job codes, matched generalized job descriptions to benchmark jobs, and established salary ranges for job codes. Finberg Decl. ¶ 30; Cert. Mem. 20. But as explained above, job codes say nothing of the "facts and circumstances of a *particular case*." *Hunt*, 282 F.3d at 1030 (emphasis added) (internal quotation marks omitted). Plaintiffs offer no plan for classwide determination of the "micro-level" analysis that the EPA demands. *Kassman*, 2018 WL 6264835, at *27.

[20] *See, e.g.*, *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011); *Wagner v. Taylor*, 836 F.2d 578, 595 (D.C. Cir. 1987); *Moussouris.* 2018 WL 3328418, at *29; *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001).

Plaintiffs' "trial plan" is likewise silent as to how the Court could evaluate Oracle's affirmative defenses for each member of the class, which may entail looking to any combination of expertise, relevant experience, management and mentoring skills, initiative, and so on, and determining how comparator males measure on each of these dimensions. *See* Neumark Dep. 229:4-230:12. To the extent that prior pay played a role in a class member's compensation, the Court would have to apply three different standards to determine the extent to which Oracle was permitted to rely on it. *Supra* 17 n.14. And because, under the post-2016 version of the law, bona fide factors must be applied reasonably and explain "the entire wage differential," *see* Cal. Lab. Code § 1197.5(a)(3), the Court would have to make these evaluations for every individual class member with a purported pay inequity arising from 2016 and beyond.

These intractable manageability problems defeat Plaintiffs' argument that a class action is superior to individualized claims. *See Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341, 1368-69 (2012) (class device not superior where "individual factual inquiries would pose overwhelming case management difficulties"); *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 587-88 (C.D. Cal. 2008) (no superiority where "the Court will be mired in over 5000 mini-trials"). Moreover, Plaintiffs' concern that it would be inefficient to adjudicate claims in "4,200 separate trials," Cert. Mem. 30, is a red herring: As explained, there is no reason to assume that any significant portion of the class actually experienced any pay inequity. *Supra* 14-19; Saad Rep. 42-43, 51-55.

V. CONCLUSION

This Court should deny Plaintiffs' motion for class certification.

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